Supreme Court of the United States

October Term, 1937—No. 436.

BROOKLYN AND QUEENS TRANSIT CORPORATION,
Plaintiff-Appellant,

against

THE CITY OF NEW YORK,
Defendant-Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW YORK.

APPELLEE'S BRIEF.

February 2, 1938.

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Opinions Below.

The opinion of the Special Term of the Supreme Court of New York in *New York Rapid Transit Corporation* v. *The City of New York* (Case No. 435), on the authority of which that Court decided the case at bar (R. 2), is unofficially reported in 97 N. Y. L. J. 241. The memorandum of the Appellate Division of the Supreme Court of New York, First Department (R. 54-55), is reported in 251 App. Div. (N. Y.) 710. The memorandum of the Court of Appeals of New York (R. 55-56) is reported in 275 N. Y. 454, 11 N. E. (2d) 293. The opinion of the Court of Appeals of New York in the *New York Rapid Transit Corporation* case,

which was argued and decided at the same time as the case at bar and on the authority of which the case at bar was decided by the Court of Appeals (R. 56), is reported in 275 N. Y. 258, 9 N. E. (2d) 858.

Jurisdiction.

An order allowing appeal (R. 62) was signed by the Chief Judge of the State on August 24, 1937. On October 25, 1937, this Court noted probable jurisdiction.

Question Presented.

Are New York City Local Laws Nos. 2 and 30 of 1935, adopted pursuant to authority conferred by the Legislature of the State to enable the appellee to raise funds to be earmarked for unemployment relief, and imposing a tax equal to 3% of gross receipts upon the exercise of franchises by a class of public utilities which includes the appellant, *constitutional*, or do they violate (1) the due process clause of the Fourteenth Amendment, or (2) the equal protection clause of the Fourteenth Amendment?

The State Court of last resort upheld the statutes against both challenges. 275 N. Y. 454; R. 55-56.

Statutes Involved.

The statutes involved are set forth in the record as follows:

N. Y. Laws 1934, ch. 873, R. 23;
N. Y. Laws 1935, ch. 601, R. 25;
N. Y. C. Local Law No. 2 of 1935, R. 27;
N. Y. C. Local Law No. 30 of 1935, R. 37.

Statement.

The case is here upon appeal from a judgment of the Supreme Court, New York County, entered upon a remittitur from the Court of Appeals, State of New York, in an action for money had and received to recover taxes paid under protest on the ground that the taxing statutes are unconstitutional. To the Court of Appeals was certified (Civil Practice Act, § 588 [4]) this question (R. 54): "Does the [amended] complaint herein state facts sufficient to constitute a cause of action?" And the question was answered in the negative (R. 56) in a unanimous decision without opinion (R. 55). Both lower courts were reversed, interlocutory orders denying motions to dismiss the complaint were vacated, and a final order and judgment entered dismissing the complaint with costs in all courts (R. 58).

1. The Amended Complaint.

The amended complaint alleges that the plaintiff is a domestic street railway corporation engaged in the operation of certain street surface railroads in the City of New York and is

> "under the supervision of the Transit Commission, which is the Metropolitan Division of the Department of Public Service" (R. 3).

Reference is then made (R. 4) to the Enabling Acts and the Local Laws of the City of New York passed thereunder, and it is alleged that Local Law No. 2 of 1935 imposes upon the class to which the plaintiff belongs * an excise tax equal to 3% of its gross income for the year 1935. By the same

* That is, utilities subject to the jurisdiction of the Transit Commission or the Public Service Commission of the State.

Local Law, utilities not subject to the Transit Commission or Public Service Commission are subjected to a tax of 3% of their gross operating income (R. 4-5).

Local Law No. 2 of 1935 was reenacted to cover an additional period of time (without changes of substance) by Local Law No. 30 of 1935. Its application to the plaintiff is set forth at Record 4-7.

The provisions for the earmarking of the proceeds of the tax for unemployment relief are referred to at Record 7.

The plaintiff then alleges that it has paid to the City, under protest, the sum of $756,879.50 pursuant to the local laws in question (R. 9).

Various other statutes and the taxes the plaintiff has to pay to the State and the City in order to operate under its franchises are detailed in paragraphs 20-24 of the amended complaint (R. 10-12).

The limitation of the plaintiff to a five-cent fare is set forth at Record 12.

The operation of certain new municipal subway lines directly by the defendant in competition with the plaintiff is alleged at Record 13.

The failure to tax taxicabs, though they compete with the plaintiff, is alleged at Record 14.

The fact that these taxes, though imposed for State purposes, are confined to utilities operating within the territorial limits of New York City, is alleged at Record 15.

As a further grievance it is alleged (R. 15-16) that the tax operates with peculiar severity on the plaintiff because the operating and maintenance expenses of railroad corporations "are far higher in proportion to gross receipts than the operating and maintenance expenses of corporations engaged in other types of business, but included in

the same class" subjected to taxation by the local laws in question.

Inequality is pleaded in Paragraph 37 in these terms (R. 16):

> "The imposition of the tax is a plainly arbitrary method of collecting money for unemployment relief purposes in the easiest way without any thought of or attempt at equal distribution of the tax burden in proportion to benefits or to capacity to pay on the part of the respective persons and corporations taxed, or to the value of the privilege taxed."

A summary of grievances is found in paragraph 38, where it is alleged that the local laws, as well as the Enabling Acts, (1) impair the obligations of franchise contracts between the City and the plaintiff or its predecessors in title; (2) violate the due process clause in making a fair return on plaintiff's invested capital impossible, in exacting money from one group for the benefit of another group (the unemployed), in measuring the tax by gross rather than by net income, and in taxing the plaintiff without regard to benefits received from the project the tax is aimed to support; and (3) violate the equal protection clause in that they single out one group for an especially heavy tax, they do not tax equally persons engaged in transporting passengers for hire, they do not operate throughout the State though the taxes imposed are for State purposes, they make a discrimination based upon subjection *vel non* of the taxpayer to the supervision of the Transit Commission or Public Service Commission, they operate with especial burdensomeness on transportation companies because of the severity of the competition they are subjected to and because of their inability to charge more than a five-cent fare, and they tax at the same rate the gross income of different types of corporations "which are so essentially dif-

ferent in character that the ratio of net income to gross receipts in the case of one is radically less than in the case of another, * * *" (R. 16-20).

2. The Defendant's Motion to Dismiss the Complaint.

The defendant, upon due notice, moved in the court of first instance (R. 2)

> "for an order dismissing the complaint herein and directing judgment for the defendant, on the grounds that the complaint does not set forth facts sufficient to state a cause of action and that the Court has no jurisdiction of this action, and for such other and further relief as to this Court may seem just and proper."

The jurisdictional question raised by the motion is no longer in the case, the Court of Appeals having held in the companion case that the Court did have jurisdiction of an action at law in the premises.

3. The Decision of the Court of Appeals.

No opinion was given by the Court of Appeals. The order denying defendant's motion to dismiss the complaint was reversed (R. 56) upon the authority of *New York Rapid Transit Corporation* v. *The City of New York* (No. 435) which was argued simultaneously with the present case.

Summary of Argument.

Upon the record as outlined above, we propose to argue as follows:

1. The separate classification of utilities was not a denial of equal protection. Although the proceeds of the tax were earmarked for unemployment relief, the classi-

fication was not required to be based on considerations other than those sufficient to support a general revenue tax since (1) the burdens of the tax need not be apportioned to the benefits derived; and (2) the alleged defect could be removed by separation of tax and appropriation. And in any event the possible legislative considerations amply justify the classification.

2. Uniform treatment of rapid transit companies and other utilities is not a denial of equal protection since the Fourteenth Amendment does not forbid incidental inequalities arising from uniform treatment and since the legislature would have been justified in classifying rapid transit companies separately from other utilities. (Under this same point we shall deal briefly with appellant's claim of hostile discrimination in violation of the due process clause.)

Argument.

This is a companion case to *New York Rapid Transit Corporation* v. *The City of New York*, No. 435, present term, which is being argued simultaneously herewith. The issues in the two cases are substantially identical, so far as the appeals in this Court are concerned, except that the contention made by New York Rapid Transit Corporation in Case No. 435 that the local laws impair the obligation of its contract with the City is, as appellant here concedes (Brief, p. 16), not involved in the present case.

Therefore in order to avoid unnecessary duplication, we adopt, as the argument in support of appellee's contentions on this appeal, the arguments made under Points I and II (pp. 9-24) in appellee's brief in Case No. 435, and hereby incorporate the same herein by reference.

Conclusion.

The judgment appealed from should be affirmed, with costs.

Dated, New York, N. Y., February 2, 1938.

Respectfully submitted,

WILLIAM C. CHANLER,
Corporation Counsel
of the City of New York,
Attorney for Appellee.

PAXTON BLAIR,
OSCAR S. COX,
DAVIDSON SOMMERS,
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ON APPEALS FROM THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION OF THE APPELLANTS FOR REHEARING

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The appellants above named, appreciating that the Court has given careful consideration to these cases, but